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ABSTRACT

In press law, the individual right of freedom of the press frequently is linked to a public interest or "watchdog" concept of freedom of the press. This concept suggests that the basis for the constitutional protection of press freedom is the role of the press as an institution serving a collective good, as opposed to the traditional view of freedom of the press as an individual right. Distinguishing the two concepts raises questions about the origin, development, and use of the watchdog metaphor in press law. A review of 19th century newspapers reveals that publishers used the wathchdog role in attempts to fashion a legal defense for the publication of false information within the common law of libel. As the number of libel suits increased in the last three decades of the century, publishers turned with increasing frequency to the watchdog role. A few courts accepted this role as a justification for the publication of libelous facts, but the majority questioned the public interest served by the publication of such information and the ability of the self-proclaimed watchdog to act in the public interest.
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THE WATCHDOG IN NINETEENTH CENTURY LIBEL LAW: A Common Law Concept of Freedom of the Press

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THE WATCHDOG IN NINETEENTH CENTURY LIBEL LAW: A Common Law Concept Of Freedom Of The Press

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In press law the individual right of freedom of the press frequently is linked to another conception of freedom of the press: A public interest concept of freedom of the press, in which role of the institutional press is frequently called the "watchdog" role of the press. This public interest rationale suggests that the basis for constitutional protection of freedom of the press is the role of the press as an institution serving a collective good, rather than the traditional view of freedom of the press as an individual right. Distinguishing the individual right of freedom of the press from the watchdog metaphor raises questions about the origin, development, and use of the watchdog metaphor in press law. If freedom of the press is an individual right--clearly the dominant view--then what is the source of the public interest metaphor?

The research presented in this paper shows that publishers in the nineteenth century used the watchdog role of the press in attempts to fashion a legal defense for the publication of false facts within the common law of libel. As the number of libel suits increased in the last three decades of the 19th century, publishers turned with increasing frequency to the watchdog role of the press. A few courts accepted the watchdog role of the press as a justification for the publication of libelous facts, but the majority questioned the public interest served by the publication of such information, and ability of the self-proclaimed public watchdog to act in the public's interest.

THE WATCHDOG IN NINETEENTH CENTURY LIBEL LAW: A COMMON LAW CONCEPT OF FREEDOM OF THE PRESS

INTRODUCTION

In First Amendment theory and jurisprudence, freedom of speech and press is a right belonging to individuals. Justice Louis Brandeis' classic statement of freedom of expression in Whitney v California,[1] captures the essence of this fundamental individual right:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties...They believed that freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth.[2]

Brandeis identified two components of freedom of expression: (1) the right of individuals to personal fulfillment through the exercise of freedom of expression; and (2), the right of individuals to participate in political debate. His sole emphasis on the individual's right without any reference to government's power to limit the right reflects a twentieth century concept of freedom of expression. Prior to the twentieth century, judges held a narrower view of the societal value of dissident speech.

In the nineteenth century, freedom of the press questions were resolved in the common law.[3] In contrast to the liberal Brandeisian view of freedom of the press, William Blackstone's definition of common law freedom of the press protected a narrow area of expression:

> Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.[4]

The Blackstonian definition of freedom of the press gave judges broad discretionary power to determine the limits of proper expression. Rather than assuming the value of individual expression, the

common law determined the value of expression by measuring the public benefit of expression. For readers schooled in twentieth century liberal free press theory and constitutional law, the nineteenth century balance between individual's right to speak and court's power to limit that right for the public good may be a trip "through the looking glass" where "things go the other way."[5]

In nineteenth century libel law and contempt by publication case law, newspaper publishers raised the freedom of the press as barrier against unfavorable common law doctrines. Freedom of the press was not treated as a constitutional question and the common law exposed a broad spectrum of newspaper content to libel or contempt actions. Within the common law publishers attempted to fashion a concept of freedom of the press more favorable to the newspaper industry. In libel litigation concerning publication of matters of public concern, publishers argued that newspapers required special protections under the freedom of the press because the institution of the press had a duty to gather and report information about the operation of government and other matters of public concern. They claimed that the press' unique newsgathering and news disseminating abilities, that is, they claimed that the function of the institutional press in society, required that the law recognize an institutional right to freedom of the press. In the twentieth century, this concept of freedom of the press is generally referred to as the "watchdog role of the press."[6]

Freedom of the press became a constitutional question in the twentieth century.[7] The Supreme Court of the United States first heard cases dealing with the free press clause of the First Amendment to the Constitution of the United States in the late 1800s, but it did not

directly address the meaning of constitutional freedom of press until the 1900s.[8]

In the twentieth century, liberal theorists have developed an individual-rights based theory of freedom of the press. This effort has focused on the meaning of freedom of the press within state and federal constitutional law. Legal scholars, including Zechariah Chafee,[9] Alexander Meiklejohn,[10] and Thomas Emerson,[11] attempted to incorporate both the individual's right to personal fulfillment and the right to participate in political debate into comprehensive theories of freedom of speech and press. In recent years, legal theorists, such as Michael Perry,[12] Martin Redish,[13] Thomas Scanlon,[14] and Ronald Dworkin,[15] have participated in an extensive dialogue about the "theory and doctrine"[16] of freedom of expression. While significant differences exist among the participants in the contemporary debate, all agree that freedom of expression is an individual right, and that any meaningful concept of freedom of speech and press must begin from that understanding.

But the watchdog concept also appears in free press case law and discussions about the meaning of freedom of the press. Lawyers, judges and commentators claim special protection for the institutional press. They argue that the institutional press has (or should have) special protection because of the societal function it serves as a gatherer and disseminator of information about the operation of government and other matters of public concern.[17]

Floyd Abrams, a prominent attorney who frequently represents media clients, has said that "the press is different" from any other institutional entity in the United States because "the press...serves as a vigilant protector of the public from its government."[18] And law

professor Vincent Blasi suggests that "the inevitable size and complexity of modern government" creates the need for an institutional press "capable of acquiring enough information to pass judgment on the actions of government, and also capable of disseminating their information and judgments to the general public."[19]

The characterization of the press as a watchdog is found in journalism literature. Journalism texts refer to the press as "the 4th Estate"[20] and the press and reporters as "independent watchdogs,"[21] or "public servants."[22] A recent report on the public's view of the role of the press found that more than half of the people surveyed believed that "news organizations protect the democratic process" and sixty-seven percent believed the press "keeps political leaders from doing what should not be done."[23] Halfway through President Ronald Reagan's first term Columbia Journalism Review asked, "Can our watchdog press sniff a smoking gun?"[24] Clearly the watchdog comprises part of the American tradition of freedom of the press.

Judicial recognition of the importance of the press' institutional function is firmly set in First Amendment case law. For example, in Near v Minnesota[25], the first major freedom of the press case decided by the Supreme Court of the United States, Chief Justice Charles Evans Hughes cited "the [public's] primary need of a vigilant and courageous press"[26] to combat governmental "malfeasance and corruption."[27] In Sheppard v Maxwell,[28] Justice Tom Clark wrote, "The press...guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny".[29] Justice Hugo Black, in New York Times v United States,[30] rejected the government's claim of national security, writing that "the press was protected so that it could bare the secrets of govern-

ment and inform the people."[31] In Saxbe v Washington Post,[32] Justice Louis Powell called the press "an agent of the public at large."[33]

However, the general agreement and support for an institutional role for the press has not lead to acceptance of the watchdog concept of freedom of the press. In 1980, following a term in which the Court heard several cases in which the press claimed "a distinct and preferred status,"[34] Archibald Cox observed that the "press has been notably unsuccessful in the effort to obtain special privileges and immunities."[35] Contrasting the liberal individual-rights based concept of freedom of the press to the watchdog concept suggests that theoretical inconsistency between the two concepts of freedom of the press contributes to the failure of the watchdog concept.

The Watchdog and Free Press Theory

The watchdog concept is used by press advocates to lend support to claims of special constitutional protections for the press; but it is inconsistent with the twentieth century liberal concept of freedom of the press. The right to freedom of the press is an individual right. The watchdog role of the press is based on the press' function as an institution serving a collective good. Instead of basing claims for greater protection on the individual rights of the reporters, editors, and publishers who make up "the press," the watchdog attempts to establish a distinct institutional right. It is a complementary, but different, conception of the meaning of freedom of the press. Individual-based freedom of the press exists because individual expression has an inherent value to both the individual and to society. The watchdog role of the press is premised on the conse-

quences of the institution's expression. Only that speech which benefits the collective good is worthy of protection.

Ronald Dworkin describes the watchdog concept as a "policy for free speech and free press"[36], that is, it is "intended to establish a collective goal."[37] In contrast, the twentieth century liberal concept of freedom of the press is a "principle of free speech"[38]: an individual right that protects "the historically central function of the First Amendment, which is simply to ensure that those who wish to speak on matters of political and social controversy are free to do so."[39]

Dworkin argues that confusing the collective-based claim of the institutional press with the individual-based right weakens the power of the principle of freedom of speech and press. If judges decide free press cases based on the principle of a fundamental human right to freedom of the press, the right should "trump." However, if judges base free press decisions on a policy of freedom of the press, they are less constrained by the individual right to freedom of the press and more likely to decide cases based on their perception of the public good.

For example, in cases where the press claimed a special right of access to prisons, the Supreme Court simply weighed the public benefit in granting the press special access against the government's assertion of the need for orderly and efficient operation of prisons. It found that orderly and efficient prisons served a greater public good.[40]

If the collective good is the primary criteria used to determine the meaning of the constitutional protection of freedom of the press, then constitutional free press safeguards become less powerful. All

western democracies recognize freedom of the press, but, as becomes quite evident if the ability of government to regulate mass media freedom of the press in the United States is compared to the permissible regulation of media in England or other western European countries, the constitutional right to freedom of the press in the United States is distinct. In Press Law in Modern Democracies,[41] Avriam Soifer contrasts press law in the United States to press law in western Europe and identifies the source and power of the right.

> Freedom of the press in the United States is much more than a legal concept--it is almost a religious tenet....[T]he freedom of each citizen to communicate and to choose among diverse opinions is near the core of American individualism.[42]

In addition to Dworkin, a number of legal theorists and scholars argue that the watchdog concept is in conflict with the liberal individual right concept of freedom of the press. This position is stated in a number of ways, but a general statement of the argument contains the following elements:

(1) A rights-based concept of law only makes sense when discussed in terms of rights belonging to individuals. Under the federal Constitution only individuals (corporate entities are treated as individuals) can claim constitutional rights. This fundamental premise of the concept of rights, and the clustering of the constitutional right of freedom of the press with the freedoms of speech, religion, petition, and assembly embedded in a document specifically addressing individual rights, are persuasive arguments against the claim that the First Amendment is an "unusual guarantee of [printers' and publishers'] business rights."[43]

(2) Traditional concepts of freedom of the press are based on a view of the press as a collection of individuals exercising

an individual right and thereby serving the collective interest. For example, the "marketplace of ideas" concept of freedom of the press presumes that "the ultimate good desired is better reached through the fair trade of ideas."[44] Chafee defined the First Amendment as protecting two interdependent interests, both served by the exercise of an individual right of freedom of expression:

> There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth...[45]

(3) The watchdog concept assumes that the press is an institutional entity serving the collective good. If the measure of the institution's right to freedom of the press is its ability to serve the public interest, then the institution is not an independent entity exercising a right; it is a subservient with <u>legal</u> obligations to its public.

(4) Under the watchdog concept, the relation between the press and the public is one of "agency."[46] If the press is an agent of the people, it is accountable to standards set by the majority. Thus, the metaphor creates obligations and privileges for the press--not a unique right.

(5) The only sound basis for expanding or strengthening constitutional protection of the press is to fashion rationales based on the principle of freedom of the press. Authors have argued: that the <u>functions</u> of the press (e.g. newsgathering) should be protected when practiced by any individual;[47] that the First Amendment exists to serve the value of "individual self-realization;"[48] which encompasses both political and non-political speech;[49] that "[u]nder the principle of freedom of expression government is presumptively disabled from

interfering with communication of or access to protected information or ideas...useful to the people in their allied capacities as participants in government and seekers of understanding,[50] and that principles of "autonomy"[51] or "equality"[52] best serve the interests of freedom of the press.

The Origins of the Watchdog

The lack of a coherent watchdog concept within twentieth century liberal free press theory raises questions about the origin, development, and use of the watchdog concept in press law. If freedom of the press is an individual right--clearly the dominant view--then what is the source of the watchdog role of the press? How did it become part of a widely-held tradition of freedom of the press?

One attempt to explain the watchdog concept focuses on status of the institutional press under the speech and press clauses of the First Amendment. Justice Potter Stewart, in a 1974 speech, advanced the thesis that the press clause is a "structural"[53] provision of the Constitution:

> It is my thesis that...the established American press in the past ten years, has performed precisely the function it was intended to perform by those who wrote the First Amendment to our Constitution....[T]he free press guarantee is, in essence, a structural provision of the Constitution....The publishing business is, in short, the only organized private business that is given explicit constitutional protection.[54]

While Justice Stewart's thesis has attracted much attention, it has not been accepted by the Court.[55] And Anthony Lewis has suggested that Justice Stewart's use of both the speech and press clause in Richmond Newspapers v Virginia[56] was a "strategic withdrawal"[57] from the idea of a special protection for the institutional press.

The common law was the source of the watchdog concept of freedom of the press. Newspapers publishers used the watchdog concept of freedom of the press as part of an extended effort to fashion special protection for newspapers in the common law of libel. The common law did not provide broad protection for individual speech. Judges had great freedom to determine the public good served by publication, and the measure of the public good defined the limits of protected speech. Publishers used the watchdog concept in an effort to create special protection in libel law for the press. They claimed that public journals had a special duty which mandated that they publish otherwise unprotected libels concerning public officials.

Until very recently the historiography of freedom of the press ignored the nineteenth century. The history of freedom of the press was the history of the First Amendment. Between the end of the Alien and Sedition Acts and the late 1800s, the federal government did not play a central role in regulating the press. As a result few First Amendment cases were litigated before the twentieth century. However, freedom of the press was an important issue in nineteenth century state courts. Examination of the use of the watchdog concept of freedom of the press sheds additional light on a largely ignored, but very important segment of free press history.

Also, it highlights the importance of legal process and practice in the development of free press law. Traditional legal history focused on the evolution of legal doctrine with little analysis of the social, political or economic forces which influenced the law.[58] The development and use of the watchdog was not a result of doctrinal or theoretical changes in the law. It was the response of a special interest litigant to the demands of the common law.

The source of the watchdog concept is to be found in the practice of nineteenth century common law. This points out the tenuous relation between legal practice and legal theory. The law is a creature of the adversarial process. It is made in courtrooms in front of judges. It is important to examine the practice of law in order to understand the product. But little sense can be made of the use and development of the watchdog concept without an understanding of free press theory.

THE WATCHDOG IN NINETEENTH CENTURY LIBEL LAW

The common law of libel placed severe limits on the freedom of the press. In response to the demands of the common law, newspaper publishers attempted to establish the watchdog concept of freedom of the press in the common law. If the effort had been successful, the watchdog would have protected the publication of otherwise unprotected defamatory material.

A judge in a Massachusetts courtroom in the late 1820s observed that "[w]henever there is an attempt to maintain a prosecution for libel, it almost necessarily brings under discussion the freedom of the press."[59] In the nineteenth century, debate over the meaning of freedom of the press took place in civil and criminal libel litigation, but the majority of litigation concerned civil libel actions.[60] Publishers adopted the status of institutional watchdogs serving the public interest throughout the century. With increasing frequency in the second half of the century, publishers fighting libel actions defined the press as being a distinct entity with a duty to the public to observe, investigate and report public proceedings, the actions of public officials, and other matters of public interest. Newspaper advocates argued that the watchdog role required the creation of

special protections in libel law for the press. Advocates attempted to expand the common law of libel in order to carve out a special niche for the press in the existing common law privileges available to all citizens.

Common law privilege was a means of operationalizing freedom of the press. In contrast to the present, when freedom of the press in libel law is seen primarily as a constitutional question,[61] in the nineteenth century and early twentieth century, the common law defined the boundaries and meaning of freedom of the press.

The narrow privileges provided in the common law for criticism of public officials and government and reporting on judicial and legislative proceedings, were crucibles in which judges and advocates in libel suits struggled to preserve or to reshape the common law and to interpret legislative efforts to codify common law privileges in statutes.[62] Much of the debate concerned differing views of the public value of defamatory publications and the role of newspapers in society. Advocates for newspaper publishers urged the courts to establish the press as an institutional watchdog by creating a more liberal privilege for the watchdogs. However, judges throughout the nineteenth century decried the policies and practices of a "licentious"[63] press and consistently found its reporting of libelous information to be outside the bounds of privileged communication.

As the commercial newspaper industry experienced rapid growth after the Civil War and the newsgathering function grew more complex and institutionalized, defendants described the press as "public journals"[64] with a duty and responsibility to act as a watchdog for the public in matters of government and public importance. This use of the watchdog role of the press fit very comfortably into a standard common

law analysis of conditional privilege. If the defendant in a civil libel suit could show a duty or responsibility to report defamatory information because it served the public's interest, then the defendant could win the suit, or at least limit the damage award to the plaintiff.

Publishers' lack of success in creating a special niche for the newspaper industry through the use of a watchdog conception of freedom of the press does not diminish the significance of the effort. Nineteenth century common law libel is the first instance of a consistent and persistent use of the institutional watchdog concept in the history of freedom of the press in the United States. Identifying the common law and litigation as the primary influences on the development of the institutional watchdog concept of freedom of the press demonstrates the importance of these factors to the understanding of the development of freedom of the press in the United States.

The watchdog concept as it developed in nineteenth century libel law was a creature of the common law. Newspaper publishers attempted to fashion a rationale for expanding the protection provided for freedom of the press under the common law privilege by establishing in libel law an institutional role for the press as a servant of the public interest. This chapter briefly outlines privilege in the law of libel and traces the use and development of the watchdog metaphor in the forum of libel litigation.

COMMON LAW PRIVILEGE

The common law of libel protects certain types of communication from libel actions. The law limits a speaker's liability if he is sued for libel on the basis of defamatory statements contained in certain

categories of communication. These categories are called privileged communications.

There are two general categories of privilege: absolute privilege, which prevents any civil libel action based on any statement made in specified forums; and conditional privilege, which provides some protection from liability if the speaker meets the requirements of the particular privilege. Meetings of a legislative body and judicial proceedings are two examples of forums in which speakers have an absolute privilege.[65]

Conditional privileges exist where the speaker has a duty or interest to communicate potentially libelous information to an audience which has a need or duty to receive the communication. For example, a conditional privilege exists in the following situations as long as the speaker is acting in good faith and without ill will: (1) when the victim of a robbery reports the name of a suspected thief to the police; (2) when a former employer is asked to write a letter of recommendation in connection with a job application; (3) in the dissemination of commercial credit information to subscribers to a credit bureau; (4) in a letter to a public official requesting assistance with a matter of public concern.[66] In each of the above examples the relation of the duty to speak to the need to know the information is clear. In general terms, each of privileges exists because the public interest is better served by protecting the communication than by permitting a defamed person to bring action to protect his or her reputation.

Three categories of conditional privilege are of primary concern to newspaper publishers: (1) fair report privilege -- the right to publish a full and accurate report of public proceedings;[67] and (2)

good faith misstatement of fact in communications to the public about matters of vital public interest.[68] (3) the privilege of fair comment--it protects the publication of defamatory opinion.[69] The good faith mistatement of fact privilege was not recognized in the nineteenth century. The extremely narrow definition of "opinion" under fair comment limited its value to newspaper publishers. Establishing a privilege to allow good faith mistakes in reports about matters of public concern was an important goal in the effort to establish the watchdog concept.

Privileges exist in the common law to protect the public interest in receiving certain types of information. They are intended to protect the individual's right to freedom of the press. Cooley explained the reason for protecting defamatory publications in Law of Torts:

> A question of defamation is therefore not always a question merely of private scandal; it may on the other hand, involve questions of the highest public importance....We unhesitatingly recognize the fact that in many cases, however damaging it may be to individuals [reputations], there should and must be legal immunity for free speaking, and that justice and the cause of good government would suffer if it were otherwise.[70]

In the nineteenth century, conditional privilege provided a defendant with a limited defense. It did not remove all liability but it shifted the burden of proving the existence of malice, that is, evidence that the libelous publication was the product of ill will or malicious intent, to the plaintiff. In a minority of jurisdictions later in the century, conditional privilege also removed the threat of punitive damages, but in the majority of jurisdictions the value of a conditional privilege to a defendant remained the same:

> It properly signifies this and nothing more: that the excepted instances shall so far change the ordinary rule...as to remove the regular and usual presumption of

> malice, and make it incumbent on the party complaining to show malice.[71]

English courts first recognized a fair report privilege in 1795. In Curry v Walter,[72] a court held that a good faith report of judicial proceedings was not actionable provided the defendant proved the report to be "precisely the substance"[73] of the proceeding. Four years later in King v Wright,[74] the court explained the rationale for protecting the publication of defamatory information gathered in court proceedings:

> ...they are printed for the information of the public... Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice should be universally known.[75]

The English courts limited the scope of the conditional privilege to court proceedings, and conditioned the privilege on the accuracy of the report, the lack of any editorial comment, and the absence of ill will.[76]

A privilege protecting good faith misstatement of fact about matters of public concern was not recognized until 1908. In Coleman v MacLennan[77] the Kansas Supreme Court accepted the claim that the public interest in free and open discussion of public matters outweighed the protection of individual reputation.[78] This claim had been made in American courts as early as 1808,[79] when counsel for one William Clap, who was on trial for criminal libel for posting a handbill calling a state-appointed auctioneer "a liar, a scoundrel, a cheat, and a swindler,"[80] argued for greater protection for such speech:

> [The] community have [sic] an interest in his integrity, and have a right to be informed what his conduct in office is, that they may judge whether it is safe and discreet to intrust their property to his care and management....It is

> of much greater importance that this high constitutional privilege be preserved unimpaired, than that a libeller should now and then go unpunished.[81]

The Massachusetts Supreme Judicial Court held that the public interest in public order and in protecting reputation were of greater importance than libelous publication about public officials.[82] The balance struck in 1808 remained basically unchanged until the twentieth century.

Conditional privileges developed as a means of ensuring that the needs of society as a whole were being served. In contrast to individualistic notions of freedom of the press familiar to students of twentieth century constitutional law, a societal view of freedom of the press found in the common law shaped nineteenth century thinking about the legal limits of freedom of expression. Privilege existed to protect the public interest in receiving certain kinds of information, not to protect the right of speakers to speak.[83]

Since the public interest was the paramount concern, the motive of the speaker was a determinative factor. If a speaker defamed another person with the intent of harming the individual rather than serving the public interest, the privilege was lost. Standards of evidence for proving malicious intent created difficult problems for courts in cases concerning two individuals, but as the newsgathering process became more complex the problem of establishing reasonable and workable standards of evidence of malice in cases brought against newspapers created greater uncertainty in the law of libel.[84]

Within the framework of the existing conditional privilege of fair report and the desired privilege of good faith reports about public officials, newspaper publishers attempted to define a relationship between newspaper publishers, editors and reporters and the

public to expand the boundaries of conditional privilege and thereby expand the protections of freedom of the press. They claimed a duty to observe, investigate, comment and report on official proceedings of government and on the performance and moral character of public officials and candidates in order to serve the public interest. They assumed, for the purposes of defending against libel actions, the role of institutional watchdogs in a democratic society.

THE WATCHDOG

The concept of an institutional watchdog found in libel is in agreement with the checking value theory of freedom of the press.[85] As stated by Vincent Blasi, the checking value of freedom of the press is based on "the idea that free expression is valuable in part because of the function it performs in checking the abuse of official power."[86] Writers in colonial and revolutionary America discussed freedom of the press in terms of its checking value,[87] and at least one state constitution provided for the checking value of freedom of the press.

The Declaration of Rights in the Pennsylvania Constitution provided that "the freedom of the press shall not be restrained" and "printing presses shall be free to every person who undertakes to examine the proceedings of the legislature or any part of government."[88] But, in one of the earliest recorded cases in which a state court interpreted the meaning of a state constitution's freedom of the press clauses,[89] the Pennsylvania Supreme Court looked to the narrow common law view of freedom of the press to determine the meaning of the constitutional language.

Chief Justice Thomas McKean identified motive and public benefit as two factors which limited the legal boundaries of freedom of the

press. He explicitly rested his interpretation of the text of the free press clauses in the state constitution on English common law. While the state constitution gave "every citizen the right of investigating the conduct of those who are entrusted with the public business,"[90] the court said the constitution merely stated the existing common law: "The true liberty of the press is amply secured by permitting every man to publish his opinion; but it is due to the peace and dignity of society to inquire into the motives of such publications, and to distinguish between those which are meant for the use and reformation, and with an eye soley to the public good, and those which are intended merely to delude and defame."[91]

The Pennsylvania Supreme Court's definition of freedom of the press highlights the limited protection from libel actions in the late 1700s. Freedom of the press only extended to good faith statements of opinion or good faith statements of facts which held up when subjected to a severe and narrow standard of truth. The existing narrow fair report privilege was a shallow and relatively unprotected harbor on a rocky coast for publishers of newspapers.[92]

Publishers wanted the freedom to make mistakes. This freedom could be attained in the common law if (1) courts expanded the scope of the fair report privilege to include more than judicial proceedings; (2) courts created a privilege to report on the affairs of public officials and candidates; (3) the common law no longer presumed malice in civil suits; (4)and the common law recognized and incorporated the newsgathering process into the determination of malice.

Newspaper advocates used the watchdog role of the press as part of their effort to bring the above changes into the common law. The attempt to shape a special conditional privilege for the institutional

press greater than the common law privileges available to every citizen required that the role of the press be distinguished from the duty of every citizen to act as a check on the potential abuse of governmental power. Incorporation of the press' role as a watchdog into common law privilege enabled publishers to claim a duty to report defamatory information concerning public figures or officials. The presence of a duty to report provided a proper non-malicious motive for publishing otherwise actionable statements, and thereby, a rationale for expanding protection of freedom of the press.

Early Signs of the Watchdog

The watchdog concept appeared in the early 1800s. While it was not a major factor in libel case law until the last thirty years of the nineteenth century, publishers began to use it at the beginning of the century. Jurors responded favorably when advocates linked the functions of the institutional press to the strong American tradition of freedom of the press, but judges refused to grant publishers special status under the common law or to expand the existing narrow fair report privilege. Judges expressed distrust of publishers' motives and disapproval of the journalism of the day. The personal attacks and counterattacks in the political press[93] did not meet judicial standards of propriety and rational discussion. Judges wondered how a licentious press served the public interest.

As early as 1805, a newspaper publisher argued his duty to the public justified publication of a libel. The New York Evening Post published a story charging the superintendent of a county poor house with denying admission to a poor, pregnant black woman on a cold,

snowy November night. A libel suit against William Coleman, the publisher and editor of the Evening Post, followed the publication.[94]

At trial, defendant's counsel argued that the story was a fair report of police records, and that the defendant, as an editor of a "public paper," had a "duty to keep a watchful eye over [public officials], and to call the attention of the public to any of their acts, which in his opinion are neglectful or criminal."[95] He urged the jury to recognize the defendant's role as a public watchdog: "If...Mr. Coleman has done no more...than exercise his right as an editor, and his duty to the public, it is impossible you should find a verdict against him."[96]

In other early nineteenth century cases lawyers told juries that "indulgence should be shown to...the conductors of a press, whose duty is to communicate to their readers what passes in the legislature."[97] Newspapers served the public interest by, advocates said, "proclaim[ing] the vices and abuses of government."[98]

While jurors responded favorably to defendants' claims of duty and public interest, the bench found little merit in the argument. State trial and appellate court judges repeatedly rejected publishers' claim of special protection for newspapers. In denying a motion for a new trial, the New York Supreme Court said "it is denied that... editors of a newspaper...have any other rights than such as are common to all."[99]

Newspapers continually overstepped the bounds of the fair report privilege, and as a result ended up exposed to libel actions. Privilege only protected a paper's report of official governmental proceedings. It did not protect reports based on official records, ex parte judicial proceedings or the nonofficial actions of legislators relat-

ing to their official conduct. For example, a report that New York State's lieutenant governor was drunk while on the floor of the state legislature during an important proceeding fell outside the privilege.[100]

Publishers wanted judges to expand the privilege, but judges did not see the public value in allowing newspapers to publish libels against public men. Judges' opinions exhibited the bench's distrust of the press' ability or desire to serve the public interest in a "responsible" fashion if freed of legal constraints. One trial judge asked a jury, "Does the public taste demand these bitter and unmitigated aspersions of private reputation which so crowd the newspapers of the day?."[101] His answer offered little hope to newspaper publishers.

> [A] jury could render no more meritorious service to the public, than by repressing this enormous evil. It can be done only by visiting, with severe damages, him who wantonly and falsely assails the character of another through the public papers.[102]

Chief Judge Nelson of the Supreme Court of New York added his voice to the chorus of judicial critics of the press, noting that perhaps statutory relief for publishers should be granted, as the defendants had suggested, "if it be desirable to pamper a depraved public appetite or taste...by the re-publication of all the falsehoods and calumnies upon private character that may find their way into the press--to give encouragement to the widest possible circulation of these vile and defamatory publications, by protecting the retailers of them."[103]

Joseph Story's opinion in Arnold v Clifford,[104], an 1835 fair report case in a Rhode Island federal circuit court, represented the majority view on the bench. Justice Story said newspapers had a privi-

lege to report judicial proceedings, but no right to publish testimony which libeled an individual:

> There is no such right recognized in civil society, or at least in our forms of government, as the right of slandering or calumniating another. The liberty of the press does not include the right to publish libels.[105]

Story's rejection of a more liberal privilege paralleled his view of the limits of federal constitutional protection of freedom of the press. In The Constitution of the United States,[106] published in 1840, Story dismissed claims of special protection for the press and other liberal free press claims as nothing more than "loose reasoning on the subject of freedom of the press" which were "too extravagant to be held by any sound constitutional lawyer."[107] He limited freedom of the press to Blackstone's common law protections.[108]

Story's Blackstonian[109] view of freedom of the press in both common law and constitutional contexts was the dominant position in state courts throughout the United States in the 1840s. Publishers claimed special protection for the watchdog press, but the words of a Boston Municipal Court trial judge's jury instructions suggest the unfriendly reception given to the claim in most courtrooms:

> It has been argued by the defendant, that there is in this commonwealth no law making a man punishable for the publication of a libel in the public press. The court instructs you, gentlemen, that there is no such doctrine.[110]

After deliberating for fifteen minutes, the jury returned a guilty verdict against the publisher of The Daily Chronotype.[111]

The Commercial Press

The growth of a commercial newspaper industry in the United States introduced new questions into the law of libel. "News" was the primary product of the commercial newspaper industry. [112] As newspa-

pers became large organizations with layers of authority and responsibility, the increased complexity of the newspaper editorial process complicated the legal issues present in libel litigation. Publishers, editors, correspondents, and "news-collector[s]"[113] all had a hand in generating the news.

Publishers argued that libel law should be changed to account for the "peculiarity of their profession"[114] and the difficulty of determining the truth. David Dudley Field, counsel for James Gordon Bennett's New York Herald, argued that the standard of proof for newspaper editors should be "not whether the facts stated are true, but whether the [editor] believed them to be true."[115] Field reasoned that demanding absolute knowledge of truth from newspapers was too severe a standard given the complexity of the newsgathering process.

In Sheckell v Jackson,[116] counsel for the publisher attempted to introduce testimony from the "news-collector" detailing "what inquiries and examinations he made, and what sources of information he applied to,"[117] and urged the court to instruct the jury that the "public press are entitled to especial rights and privileges," because the defendant had a "duty to perform, and [if] in the performance of that duty [he] states honestly what he believes to be true, the occasion furnishes a justification for the statement, though he may be mistaken."[118] The trial judge told the jury that "the defendant's case does not come within the privileged or excepted cases."[119]

On appeal, The Supreme Judicial Court of Massachusetts affirmed the verdict for the plaintiff. Chief Justice Lemuel Shaw wrote that the press "have just the same rights as the rest of the community. They have the right to publish the truth, but no right to publish falsehoods to the injury of others with impunity."[120]

Crime news, a staple of the commercial press after the Civil War, was a fertile field for libel litigation from the 1850s to the end of the century. While judges acknowledged the press' role as the "chronicler of events,"[121] and the "channels of communicating general and important information,"[122] the law declined to accept the claims of special protection put forward by publishers. Instead, the majority of judges shared the view of the Connecticut Supreme Court in Moore v Stevenson:[123]

> ...newspapers are looked to as the channels of communicating general and important information; but even here we may demand from an editor, whether he be himself the author, or only opens his columns to others, that he exercise the care and vigilance of a prudent and conscientious man yielding the power of the public press. Nothing will be gained by too much relaxation of the law of libel.[124]

Courts refused to expand the limits of the fair report privilege, in part because of judges' displeasure with the increased sensational reporting of crime news and the insertion of editorial comment into crime and trial stories. In Louisiana, the publisher of the New Orleans Crescent lost a libel suit[125] brought by a sea captain because its report of his arrest was "exaggerated and inflammatory"[126] and "assured and proclaimed"[127] the guilt of the captain. The Ohio Supreme Court affirmed a libel judgment against the publisher of the Hamilton Telegraph[128] for reporting that a state official had been charged with illegally diverting state funds and observing that he "had become... notorious for depravity, recklessness, and peculation."[129]

The Watchdog Arrives: 1860-1890

After the Civil War, publishers increasingly turned to the watchdog. The use of the watchdog conception of freedom of the press in the late 1860s signaled the beginning of more than three decades during

which publishers defended editorial and newsgathering practices in terms of their duty to serve the public interest. The watchdog function required, publishers argued, that they be shielded from libel actions brought by public officials, candidates for public office, and individuals caught in the criminal justice system.

A South Carolina lawyer's statement to a jury misstated the law as it existed but stated clearly the law publishers desired.[130]

> Considering the mission of the press in modern society it is not difficult to discover why it has been singled out as it has for special protection. It is because the comments of the free press are ofttimes the only protection against official corruption and venality.[131]

The number of litigated libel suits exploded after the Civil War.[132] In case after case newspaper publishers argued for special privilege and asked judges and juries to consider the watchdog role of the press in modern society. In addition to litigation, the newspaper industry attempted to get protective legislation passed. Libel law was one of the first industry problems addressed by the ANPA and the National Editorial Association. In the late 1880s and early 1890s both groups were engaged in efforts to pass state and federal libel laws.[133]

The rise in the number of libel suits is explained, in part, by the rapid increase in the number of newspapers in the second half of the nineteenth century. The number of daily newspapers published in the United States rose from 254 in 1850 to 574 in 1870 and 971 in 1880.[134]

Also, the case law suggests that newspapers' proclivity toward convicting defendants in criminal actions and inserting editorial comment into news reports generated libel suits. Judges continued to

tell publishers that sensational, intemperate, and false information did not serve the public good.

Two cases at the end of the 1860s illustrate the utility of the watchdog role of the press in fashioning a protection within libel law. When courts accepted the press' watchdog role, they fashioned greater protection in libel law for the newsgathering functions of the press. When courts rejected the watchdog claim, the common law of libel remained unchanged.

In Smith v Tribune,[135] a federal district court judge rejected a defendant's claim of special privilege to report about public officials:

> [I]t is not an answer to say that [Smith] is a public man...and that the defendants are the publishers of a newspaper...[Freedom of the press] has never been understood as authorizing the bringing of charges against a man... unless those charges were true...I hardly think that with an honest motive a journalist has a right to proclaim to the world that a particular man is a thief.[136]

But, in Detroit Daily Post v McArthur[137] the Michigan Supreme Court acknowledged the institutional role of the press. "A special protection for newspapers within the common law was necessary," Justice Cambell wrote, "inasmuch as the newspaper press is one of the necessities of civilization, the conditions under which it is required to be conducted should not be unreasonable or vexatious."[138]

Because the press served the public interest, the court addressed the questions raised by the institutional practices and constraints of the newspaper business. "There is no doubt," the court said, "of the duty of every publisher to see at all hazards that no libel appears in his paper."[139] But if the publisher could prove he had employed competent editors, and had instituted rules and practices to prevent libels

from appearing in his paper,the freedom of the press prevented the awarding of punitive damages.[140]

Where judges accepted the watchdog concept, publishers received greater protection from libel suits, but most courts continued to reject the watchdog claims of publishers. The content and tone of the libels before the bench contributed to judicial resistance to the watchdog concept.

A Sensational Press

The following selections from libel suits brought in the 1870s illustrate the type of reports which generated libel actions. In a story reporting a guilty verdict, a Colorado paper judged the performance of the jury: "We cannot express the contempt which should be felt for these twelve men, who have thus not only offended public opinion, but have done an injustice to their own oaths."[141]

A Maryland newspaper reported an arrest and holding over for grand jury on a charge of indecent exposure:

> THE RUFFIAN CAGED...It appears he is a low character who habitually frequents the streets and seeks to throw himself in the way of school girls.[142]

The Pioneer Press in Minnesota began an erroneous report of the arrest of a telegraph operator with the following lead: "The Pine City telegraph operator is a bad one. He is now under arrest for attempting to ravish a Swede woman..."[143]

The Chicago Times published a false report of a coroner's inqu in which it reported that the widow of the subject of the inquest had a child by another man.[144]

Articles concerning elected officials and candidates also generated libel suits in the 1870s. During the political press period,

politicians responded to harsh criticism and falsehood in the press. By the 1870s, political figures responded to false or questionable charges by filing libel suits. Stories that prompted libel suits included one in a Kalamazoo, Michigan, paper reporting that a candidate for Congress on the Prohibition ticket was "convicted of stealing whiskey fines" and was a "pettifogging shyster" who had lost his position in a local church because he was an adulterer,[145] and a report in an Indiana paper stating that a candidate was "running for Congress not on any platform or well defined issue...but simply on beer and bribery."[146]

Judges stated their disapproval of the tone and content of the newspaper press. The criticism of the Chief Justice Lawrence of the Illinois Supreme Court reflects a commonly held view in the judiciary of the late 1800s:

> The article in question, grossly libelous as it is, is a kind lamentably frequent in the columns of American newspapers. There is probably no country in the civilized world where private character has so little security against newspaper assault. The conductors of the press...are singularly reckless in the exercise of their great power...[i]n pandering to the morbid taste of their readers for personal and worthless gossip.[147]

The state of the American press made it "difficult to see," Chief Justice Lawrence said, "how the public is to be benefited" by such reports or why the courts or legislatures should create protection for such a press.[148]

The Duty to Report the News

The watchdog concept of freedom of the press answered judicial criticism. The institutional press should be protected because it had a public duty to perform. The excesses of the press were regrettable,

but the duty to gather the news in the public interest outweighed the harm caused by newspapers' transgressions.

An excerpt of a reporter's testimony in Marks v Baker[149] illustrates the value of the watchdog role as a defense. A candidate for city treasurer brought suit after a newspaper charged him with embezzling city funds.

Question (Q): What was your object in publishing the article?

Answer (A): I published it for the general public interest.

Q: Did you have any other object in publishing the article?

A: I did not.

Q: You stated that you had no other purpose than doing a public duty in publishing the article. I want to know what your object was--to charge someone with a crime, or whether you had some other object?

A: To draw attention to the discrepancy of the two reports. I had seen what purported to be the official report of the county auditor, and I had seen the city reporter's report...[150]

The duty to publish in the public interest established a proper motive and justification for defaming public officials. Judge Cooley wrote one of the clearest statements on the importance of the watchdog duty:

> Few duties can be plainer than to challenge public attention to the official disregard of the principles which protect public and personal liberty.[151]

In Pennsylvania, the Supreme Court expanded the watchdog role of the press to include investigation of a privately owned "School for Clerks,"[152] stating that "the press was in the strict line of its duty when it sought to show that the plaintiff was a charlatan."[153]

But courts' power to measure the public benefit of the watchdog's performance of its role, made for uncertainty. In Bourreseau v Detroit Evening Journal Co.,[154] the Michigan Supreme Court rejected a claim

of privilege for a story reporting that "justices and constables" of a Michigan township made a practice of "careless and unwarranted arrests" of persons passing through the area.[155] The newspaper claimed privilege because "as a public journal, in pursuance of its duty, [it] felt compelled to lay before the public generally the statements gathered by its reporters."[156] The Court disagreed saying that the publication of unproven charges did not serve the public good.[157]

The different standards applied in Press Co. and Bourreseau suggest the problem confronting publishers who were attempting to fashion a defense of conditional privilege to report about matters of public concern. Some courts had accepted the claim that the watchdog concept established an institutional duty, but judges disagreed over the protection the watchdog created. This uncertainty reduced the value of the privilege to publishers, and diminished newspapers' ability to act as an institutional watchdog. As Justice Cooley observed in an 1881 dissent, "Who would venture to expose a swindler or a blackmailer...if every word and sentence must be uttered with judicial calmness and impartiality...and every fact and every inference be justified by unquestionable legal evidence?"[158]

For the watchdog to provide a meaningful defense, the complexity and uncertainty of newsgathering had to be taken into account, and duty rather than absolute accuracy had to become the dominant factor in determining the scope of the privilege. Publishers wanted to remove the burden of assumed malice.

Newsgathering

Michigan courts led the way in exploring the process of gathering news and its relation to proving malice. Where courts had previously

held that the responsibility to publish the truth required papers to wait until they were absolutely certain of the truth of an article, the Michigan Supreme Court recognized the timeliness of news and reasoned that the "laudable desire on the part of publishers to give their readers the very latest and most reliable news"[159] should be taken into account in determining malice. In order for a plaintiff to be awarded exemplary damages, the court said, the plaintiff had to prove negligence on the part of the defendant.[160] The mere publication of a false defamatory statement did not constitute negligence; rather, the jury must consider "all the surrounding circumstances."[161] If a publisher acted "with an earnest desire to give the public what he considered an important item of news, haste in so doing would be praiseworthy...and the time [the publisher] had for investigation and deliberation might well be considered in mitigation of damages..."[162]

Efforts to take newsgathering into account in determining the proper standards of evidence for malice were directly linked to the court's view of the press as an institutional watchdog. Judge Cooley, concurring in Foster v Scripps,[163] a libel case brought by a physician employed by the City of Detroit, stated the basic rationale for privilege:

> The reason for permitting a privilege of discussion in the case of a city physician must be this; that by operating on public opinion through the means of public discussion, the board having power of removal might indirectly be influenced, and a removal brought about in the case of an unfit officer.[164]

One year later, when the same case returned to the Supreme Court on another point of law,[165] Justice Marston identified the press' role:

> It would seem as though the public newspapers of the present day had not only the right, but that it was their duty to take part in the discussion of these matters which relate to

> the health, welfare, comfort and happiness of the people...[166]

By the end of the decade, the Michigan court had created a conditional privilege limiting damages for "an honest mistake...made in an honest attempt to enlighten the public" about public officials or candidates for public office.[167]

The watchdog concept helped establish a limited privilege in Michigan, but it also gave judges an opportunity to evaluate the newsgathering practices in Michigan newspapers. A newspaper's duty, as defined by the court, "is to investigate the facts and endeavor to give the public accurate information."[168]

In 1889, the Michigan Supreme Court examined the conduct of reporters and editors.[169] The Detroit Free Press published a report of the arrest of two men in Windsor, Ontario, on a charge of illegally selling postage stamps.[170] At trial, the reporter who wrote the story was questioned at length about the sources and the manner in which he gathered the information for the report.[171] Justice Morse took a dim view of the reporter's performance:

> [T]he item...was printed as a matter of fact coming from Windsor, when in fact it was written by an employee of the paper at Detroit, entirely from hearsay. He could have personally investigated the matter, but did not do so. He did not ask to see the men...He did not talk to the postmaster...The only thing he saw with his own eyes--the complaint--he does not mention in his publication....Nor was any care shown by the newspaper, it was, as far as the record shows, published as handed in by the reporter, without thought of verification.[172]

Having determined that the paper had not acted responsibly, Justice Morse suggested something other than the public good was behind the newspaper's claim of special protection:

> It is argued that a newspaper in this day and age of the world, when people are hungry for the news, and almost every person is a newspaper reader, must be allowed some latitude

> and more privilege than is ordinarily given under the law...In other words, because the world is thirsting for criminal items...there should be given greater immunity to gossip in newspapers...[173]

This "sophistry of reasoning," the judge said, did not provide a rationale for giving the press any special protection from libel actions.[174]

Other states echoed the Michigan court's recognition of the relation between the watchdog concept and newsgathering. The California Supreme Court limited publishers' liability for libels published in the "usual course of the defendant's business as public journalists:"[175]

> The public interest, and a due regard for freedom of the press demands that its conductors should not be mulcted in punitive damages for publications on subjects of public interest, made for laudable motives, after due inquiry as to the truth of the facts stated, and in the honest belief that they were true.[176]

One of the strongest statements of the link between the role of the press as an institutional watchdog, the expansion of the press' privilege under libel law, and the basis of both the watchdog role and the expansion of protection in the public interest, is found in a report of a trial judge's instruction to a Pennsylvania Common Pleas Court jury.[177]

> The defendants are publishers of a public journal. It was their right, and perhaps their duty to call attention to and make comments upon the manner in which public buildings were being erected...The public is frequently slow and apathetic about matters of its own concern. It is not infrequently a little deaf, and the newspapers must halloo pretty loud to attract its attention...[178]

But editors and reporters had a tendency, the judge continued, "to make a spicy paragraph at someone's expense. This is an abuse of the proper freedom of the press."[179]

A Missouri federal district court judge instructed the jury to take into account in determining damages the logistical and practical problems inherent in gathering news "because it is the function and duty of newspapers to furnish information to its readers of the current events. I say it would be a physical impossibility to send an agent to every place...to ascertain by personal examination the exact facts. A paper could not give us all which we have a right to hear of the current events of the day."[180]

And in Pennsylvania, the state Supreme Court held that "a public newspaper has a right to make inquiries regarding the official conduct of a public officer, and to publish reasonable comment and fair criticism upon it."[181] If the paper used "ordinary care, such as is proper under the circumstances to ascertain the facts" in gathering the information, the publication was privileged.[182]

But the success of the watchdog concept was limited. Most jurisdictions did not accept the publishers' claim. In Maryland, the publisher of the Hagerstown Herald and Torchlight claimed privilege for a story accusing a state senator of bribery and fraudulent activity in connection with a printing contract.[183] The senator's actions, he argued, were "proper subjects for investigation and information" and the size and population of the county mandated the paper's publication of the information in the public interest.[184] Judge Crompton dismissed the publisher's watchdog claim:

> I am at a loss to see how anyone has a right to go beyond fair comment or discussion and impute base motives merely because he believes them to be true....The fact that one is a proprietor of a newspaper entitles him to no privilege...not possessed by the community in general.[185]

The gradual and uneven expansion of the right of editors and publishers to make good faith errors in reporting matters of public

importance was the result of what the fourth edition of what Townshend's A Treatise on the Wrongs Called Libel and Slander[186] described as an "argue[ment] that the exigencies of the business of a newspaper editor, demand a larger amount of freedom."[187] The gains of the publishers in a few states were significant but fell far short of the desired protection. And in most jurisdictions, the effort failed. Townshend stated that "the law takes no judicial cognizance of newspapers...[and] recognizes no distinction in principle between the publication by the proprietor of a newspaper and a publication by any other individual."[188]

Newspaper publishers' best efforts to convince courts that the watchdog concept of freedom of the press had achieved limited success, but most courts rejected the claim. In 1879, the New Hampshire Supreme Court provided a terse statement of the status of the institutional role of the press under the law of libel:

> [The defendants] make a loose averment to their general duty to give the readers such news as they might properly judge to be of interest and value to the community...They laid stress upon their business of publishing a newspaper. But professional publishers of news are not exempt, as a privileged class...[189]

After two decades of frequent attempts to expand privilege through the use of the watchdog concept, the case reports show little success. Michigan and a few other states had recognized the problems in the newsgathering process, but the general rule remained the same: "The publisher or proprietor of a newspaper stands before the court and before a jury like any other man...if there is any class in a community who ought to be careful that no harm is done, it is the proprietors who are in charge of this powerful engine--the press."[190]

And while some courts recognized the newsgathering problems of the press, a Kentucky Court of Appeals ruling in 1889 presented the majority attitude:

> But it is said that it would be a harsh rule to require conductors of newspapers to be responsible for the truth of the information that they furnish to the public....If it is not known to be true, do not publish it.[191]

The Watchdog at the end of the Century

However, newspapers continued to claim special privilege based on their adopted role as institutional watchdog and the need for special protection for the newsgathering function. The testimony of an editor in Edwards v. San Jose Printing & Publishing Co.[192] suggests that the notion of the press as an institutional watchdog had become part of editors' and reporters' view of the profession. When questioned about the publication of a charge of vote-buying against an executive of an electric power company, the editor presented his role as a public watchdog as his justification for publishing the report:

> I used the license and liberty which I had, as editor of the paper, to announce the [vote buying]...I used my editorial prerogative to announce that fact, and I did it for the purpose of warning the company against anything of that kind...I did it for a good purpose and to prevent the very thing which it was feared would occur.[193]

But the California Supreme Court rejected the justification stating that "the mere belief of the editor of a newspaper in the justice and truth of an attack...is no defense."[194]

A Missouri Court of Appeals refused to accept a publisher's claim that a false report identifying a Mr. Arnold as the person who had stolen money from a local hospital was privileged because it was a report of police business and the result of "a common newspaper mistake."[195]

In Ex Parte Barry,[196] the California Supreme Court drew a narrow line between the watchdog's duty "to expose and bring to light any wrongful, corrupt, or improper act of a judicial officer" and the licentiousness of the press.[197] "The great trouble with the freedom of the press at the present day, so far as it affects the courts," the court said, "is that it is used indiscriminately...to gratify ill will and passion, or to pander to the passions or prejudices of others."[198] The court acknowledged the watchdog role of the press, but kept the dog on a very short leash.

The Supreme Court of Louisiana delivered a similar message to the press in Fitzpatrick v Daily States Publishing.[199] Counsel for the publishing company claimed "that it is the duty of an American Newspaper to keep the public advised of all matters of general interest; and to aid in securing good and faithful government."[200] At trial the managing editor testified that "he regarded 'a newspaper as the notary of the people, and when there is any act of corruption among any public officers [he] considers it the duty of the newspaper to take notice of it'....and he 'thought [he] would be recreant to [his] duty as a public journalist if [he] did not expose what [he] thought to be rascality.'"[201]

The court agreed that the press was a watchdog, but it found an editorial titled "A Den of Thieves," in which the newspaper called the mayor and other members of city government "blackmailers and bribe takers" and accused them of fraud and taking kickbacks, to be beyond the limits of freedom of the press.[202] The watchdog role, the court said, "can be accomplished through the instrumentality of cogent, temperate, and well reasoned editorials...This rule...will greatly tend to the promotion of truth, good morals, and good citizenship."[203]

But in Upton v Hume[204] the Oregon Supreme Court reversed a judgment for a congressional candidate whom the Bold Beach Gazette had editorialized: "[He is a] loathsome, venomous thing without shame...an infamous scoundrel; and a perjured villain...The men who voted for the old forger Upton were thieves, robbers and sons of bitches."[205] The court held that the editorial was privileged because of the "duty of the public press to discuss candidates."[206]

The Oregon court held a minority view of the protection in libel law for the press' watchdog role. The majority of courts continued to acknowledge the institutional role of the press, but to limit the protection provided by that role. The general concern of judges and their view of the press was summed up by Judge Stiness of the Rhode Island Supreme Court:

> As a publisher of news and items of public importance the press should have the freest scope, but as a scandal monger it should be held to the most rigid limitation. If a man has not the right to go around to tell of charges made by one against another, much less should a newspaper have the right to spread its broadcast in enduring form.[207]

The majority of courts continued to examine the intent of the publisher and the justification for publications in determining the protection provided by freedom of the press. Publishers had convinced the courts that they had a public duty to observe and report on matters of public concern, but they had failed in the attempt to establish special protections for the newsgathering and publishing aspects of the newspaper industry.

As the nineteenth century closed, the press had positioned itself in the common law as a watchdog serving the public interest, but the majority of courts continued to distrust the watchdog.

Conclusion

In the nineteenth century, common law privilege provided limited "breathing space"[208] for newspaper publishers, editors and reporters. The fair report privilege was narrowly interpreted and a privilege protecting good faith misstatements of facts in reports about matters of public concern had not been recognized. The existing common law privileges did not provide adequate protection for the news content of late nineteenth century newspapers. For example, reports of crime news and allegations of malfeasance on the part of public officials fell outside common law privileges. As newsgathering and the reporting of factual information became a primary function of the commercial press, publishers faced a growing number of libel actions in which they had the difficult task of proving their good intentions and justifying the publication of false information.

One response to this legal problem was an increased use of the watchdog concept as an argument for greater protections for the institutional press. American courts had liberalized the English common law privileges in recognition of the need for an informed public in a constitutional representative democracy. The watchdog concept piggybacked the institutional press onto the established liberal concept of a watchdog public. In the language of common law privilege, the need for an informed public created a duty to discuss matters of public concern. The institutional press, publishers argued, had a duty to provide the watchdog public with information, and therefore the institutional press required special protections under freedom of the press.

The watchdog concept, as defined by advocates for the newspaper industry, created a duty on the part of a newspaper publisher to serve

the needs of the public. Since a publisher had a duty to serve the public interest, and the publication of information about the actions of government served that interest, he acted without malice, and therefore, the publication should be privileged.

The history of publishers' use of the watchdog concept of freedom of the press in nineteenth century libel law shows the influence of the common law, the practice of law, and the adversarial process on the development of the meaning of freedom of the press. Newspaper publishers were confronted with a specific legal problem and they fashioned a response to that problem. Libel case law in the nineteenth century is full of assertions that publishers, editors, and reporters are protected by freedom of the press, but it is devoid of attempts to explain or understand the meaning of that freedom. In nineteenth century libel law, free press advocates spoke the language of nineteenth century common law. Within the common law, the institutional press attempted to fashion a legal protection that would shield the newsgathering and reporting practices of the industry. The result was the watchdog concept of freedom of the press.

NOTES

[1]Whitney v California, 274 U.S. 357 (1927)

[2]Ibid. p. 375.

[3]Margaret A. Blanchard. "Filling the Void: Speech and Press in State Courts prior to Gitlow." in Bill F. Chamberlain and Charlene J. Brown. eds. The First Amendment Reconsidered (New York: Longman, 1982) p. 14. Blanchard identified over two hundred and seventy cases litigated in state courts before 1925 in which freedom of the press claims were raised.

[4] 4 Blackstone Commentaries., pp. 151,152.

[5]Lewis Carroll, Alice's Adventures in Wonderland and Through the Looking-Glass, ed. Roger Lancelyn Green (London: Oxford University Press, 1971), p. 127.

[6]for example, Floyd Abrams. "The Press is Different: Reflections on Justice Stewart and the Autonomous Press." Hofstra Law Review 7 (1979): 591; Leonard W. Levy. Emergence of a Free Press (New York: Oxford University Press, 1985), p. xii.

[7]Laurence H. Tribe, Constitutional Choices (Cambridge: Harvard University Press, 1985), p. 190.

[8]The Supreme Court skirted First Amendment cases in Ex parte Jackson, 96 U.S. 727 (1877) and In re Rapier, 143 U.S. 110 (1892). In Patterson v Colorado, 205 U.S. 454 (1907), Justice Oliver Wendell Holmes used the Blackstonian definition of freedom of the press to determine the limits of constitutional protection of speech:

> The main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as has been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.

Schenck v United States, 249 U.S. 47 (1919) is generally considered the first case in which the Supreme Court attempted to determine the meaning of the federal free press clause. See Jeremy Cohen. "Schenck v United States: A Clear and Present Danger to the First Amendment" (Ph.D. dissertation, University of Washington, 1983).

[9]Zechariah Chafee, Free Speech in the United States. (Cambridge: Harvard University Press, [1920] 1942).

[10]Alexander Meiklejohn, Political Freedom. (New York: Oxford University Press, 1948).

[11]Thomas Emerson, The System of Freedom of Expression (New York: Random House, 1970).

[12]Michael J. Perry, "Freedom of Expression: An Essay On Theory And Doctrine." 78 Northwestern University Law Review 1137 (1984).

[13]Martin H. Redish. "The Value of Free Speech." University of Pennsylvania Law Review 130 (1982): 591.

[14]Thomas Scanlon. "A Theory of Freedom of Expression." Philosophy and Public Affairs 1 (1972): 204.

[15]Ronald Dworkin, Taking Rights Seriously. (Cambridge: Harvard University Press, 1978); A Matter of Principle (Cambridge: Harvard University Press, 1985).

[16]Perry, Freedom of Expression, p. 1137.

[17]T. Barton Carter, Marc A. Franklin, Jay B. Wright The First Amendment and The Fourth Estate (Mineola, N.Y.: The Foundation Press, 1985), p. 53.

[18]Abrams. "The Press is Different." p. 591.

[19]Vincent Blasi. "The Checking Value in First Amendment Theory." American Bar Foundation Research Journal 3 (1977): 541.

[20]for example Edwin Emery and Michael Emery, The Press and America, 4th ed. (Englewood Cliffs, NJ: Prentice Hall, Inc., 1978), p. xvi.

[21]for example. Nick B. Williams, "America's Third Force" in Gerald Gross edt. The Responsibilty of the Press, (New York: Fleet Publishing Co., 1966), p. 169.

[22]for example John Hohenberg. The Professional Journalist, 3rd ed.(New York: Holt, Rinehart and Winston, 1977).

[23]Times Mirror, The People & The Press (Los Angeles: Times Mirror, 1985), p. 43

[24]C.T. Hanson, "Gunsmoke and Sleeping Dogs: The Prez's Press at Midterm," Columbia Journalism Review (May/June 1983), p. 27.

[25]Near v Minnesota, 283 U.S. 697 (1931).

[26]Ibid., p. 722.

[27]Ibid.

[28]Sheppard v Maxwell, 384 U.S. 333 (1965).

[29]Ibid., p. 350.

[30]New York Times v United States, 403 U.S. 713 (1971).

[31]Ibid., p. 717.

[32]Saxbe v Washington Post, 417 U.S. 843 (1974).

[33]Ibid., p. 868.

[34]Anthony Lewis, "A Public Right To Know About Public Institutions: The First Amendment as a Sword," The Supreme Court Review (1980): 19.

[35]Archibald Cox, "Foreward: Freedom of Expression In The Burger Court," Harvard Law Review 94 (1980): 71.

[36]Dworkin, Principle, p. 386, Rights., p 90.

[37]Dworkin, Principle, p. 385.

[38]Ibid.

[39]Dworkin, Rights., p. 90.

[40]Pell v Procunier, 417 U.S. 817 (1974), Saxbe v Washington Post, 417 U.S. 843 (1974), Houchins v KQED, 438 U.S. 1 (1978).

[41]Pnina Lahav, edt. Press Law In Modern Democracies (New York: Longman, 1985).

[42]Ibid., p. 79.

[43]Alfred McClung Lee. The Daily Newspaper in America. (New York: MacMillan Co., 1937) p. 36.

[44]Abrams v United States, 250 U.S. 616, 630 (1919).

[45]Chafee, Freedom of Speech, p. 33.

[46]William W. Van Alstyne. Interpretations of the First Amendment. (Durham: Duke Unversity Press Policy Studies, 1984) pp. 60-64.

[47]Robert B. Sack. "Reflections On the Wrong Question: Special Constitutional Privilege For the Institutional Press." Hofstra Law Review 7 (1979): 629.

[48]Redish, "Free Speech," p. 593.

[49]Ibid., p. 601-604.

[50]Perry, Freedom of Expression, p. 1136.

[51]Scanlon, "Theory," p. 204.

[52]Kenneth L. Karst, "Equality as a Central Principle in the First Amendment," University of Chicago Law Review 43 (1975): 20.

[53]Potter Stewart, "Or of the Press," Hastings Law Review 26 (1975): 633.

[54]Ibid., pp. 633-634.

[55]First National Bank of Boston v Bellotti, 435 U.S. 765, 798, 801 (1978).

[56]Richmond Newspapers v Virginia, 448 U.S. 555 (1980)

[57]Lewis. "A Public Right To Know," p. 19.

[58]Charles Miller, The Supreme Court and the Uses Of History (Cambridge: Belknap Press of Harvard University Press, 1969); also see, Paul Murphy. "Time to Reclaim: The Current Challenge of American Constitutional History."American Historical Review 69 (1963): 77; Morton J. Horwitz, "Progressive Legal Historiography," Oregon Law Review 63 (1984): 679; Robert W. Gordon, "Critical Legal Histories," Stanford Law Review 36 (1984): 57.

[59]"Trial of the Case of Commonwealth v David Lee Child, 1828 Term of Supreme Judicial Court of Massachusetts," Boston, 1829, p. 89.

[60]Civil libel suits posed the greater threat to newspaper publishers. Over 150 libel actions in the nineteenth century were examined for this study. Of that number only 33 were criminal prosecutions. John Stevens, et al, in "Criminal Libel as Seditious Libel, 1916-65," 43 Journalism Quarterly 110 (1966), found the number of criminal libel prosecutions in the United States increased from 1865 to the World War I period, but again, criminal prosecutions of newspaper publishers constitute a relatively small portion of the number of criminal actions. Norman L. Rosenberg, Protecting the Best Men, (Chapel Hill: University of North Carolina Press, 1985) p. 121 found that "By the early nineteenth century...civil libel cases, ostensibly private cases, came to replace criminal prosecutions as the most prevalent restraint on political expression."

[61]New York Times v Sullivan, 376 U.S. 254 (1964).

[62]State libel statutes were enacted as early as the 1820s. The early statutes provided that truth was a defense in criminal actions. Several states passed libel statutes in the 1840s and 1850s. These statutes codified common law privilege and specifically addressed the problems of the newspaper industry and newsgathering. The Connecticut statute, as described by the state Supreme Court in Hotchkiss v Porter, 30 Conn. 414, 420 (1862), protected the newsgathering function of the newspaper industry:

> The Act of 1855 was...enacted to prevent editors of newspapers from being subjected to heavy punitive damages for articles which contained rumors, so generally circulated and credited as to constitute part of the current news of the day, or proper and just criticism upon public men, public measures or candidates for office, or other matters of public interest.

By the late 1880s, the American Newspaper Publishers Association (ANPA) and the National Editorial Association (NEA) were pressing for state libel statutes and exploring the possibility of a uniform

federal statute. See ANPA Annual Minutes, 1890 to 1899, and The First Decennium of the National Editorial Association (Chicago: NEA, 1896).

[63]For example, see, U.S. v Calender, 25 Fed Cas 239, 258 (D.Va., 1800), King v Root, 4 Wend 113,133 (N.Y., 1829), Commonwealth v Blanding, 20 Mass. 304, 313 (1825), Dexter v Spear, 7 Fed. Cas. 624 (D.R.I, 1825), Commonwealth v Whitmarsh, American Jurist 16 (Mass, 1836): 104, Giddens v Mark, 4 Ga. 364, 367 (1848), Moore v Stevenson, 27 Conn. 14, 29 (1858), State v Jeandell, 5 Harr. 475, 480 (Del., 1854), Smart v Blanchard, 42 N.H. 137, 151 (1860), Foster v Scripps, 39 Mich. 376 (1878), Barr v Moore, 87 Pa. 385, 392 (1878), Morton v State, 3 Tex Crim App 510, 515 (1878), Perret v New Orleans Times, 25 La. Ann. 170, 178 (1873), Rearick v Wilcox, 81 Ill. 77, 81 (1876), Riley v Lee, 11 S.W. 713, 715 (Ky,1889), Regensperger v Kiefer, 7 A. 724, 725 (Pa., 1887), Metcalf v Times Publishing Co., 40 A. 864, 865 (1898).

[64]The phrases "public journal," "public journalist," "public newspaper," or "public press" appear from the 1860s to the end of the century. For example, see, Aldrich v Press Publishing Co., 9 Minn. 123 (1864), Barnes v Campbell, 59 N.H. 128 (1879), Belknap v Ball, 47 N.W. 674 (Mich., 1890), Bigney v Van Benthusen, 36 La. Ann. 38 (1884), Edwards v San Jose Printing Co., 34 P. 128 (Ca, 1893), Express Printing Co. v Copeland, 64 Tex. 354 (1885), Fitzpatrick v Daily States Publishing Co, 20 So. 173 (1896), Metcalf v Times Publishing, 40 A. 864 (1898), Negley v Farrow, 45 A. 715 (Md., 1882), Peoples v The Detroit Post & Tribune, 54 Mich. 457 (1885), Sanford v Bennett, 24 N.Y. 20 (1861), State v Schmidt, 9 A. 774 (1887), Struthers & Sons v The Evening Bulletin, 3 W.N.C. 215 (Pa., 1877), Upton v Hume, 33 P. 810 (1893), Wilson v Fitch, 41 Cal. 363 (1871).

[65]Thomas Cooley, Constitutional Limitations, 6th edt., (Boston: Little Brown, 1890), p. 523.

> ABSOLUTE: "those [classes of communications] which, for reasons of state policy, the law will not suffer to be the foundation of a civil action..."
> CONDITIONAL: "those [classes of communications] in which the circumstances are held to rebut the legal inference of malice, and to throw upon the plaintiff the burden of offering some evidence of its existence beyond the mere falsity of the charge..."

[66]Joel D. Eaton. "The American Law of Defamation Through Gertz v Robert Welch, Inc. and Beyond: An Analytical Primer" Virginia Law Review 61 (1975): 1362.

[67]Harold L. Nelson, Libel In News of Congressional Investigating Committees, (Minneapolis: The University of Minnesota Press 1961), pp. 5-6; Kathryn Dix Sowle, "Defamation and the First Amendment", New York University Law Review 54 (1979): 478-487.

[68]In the common law, the good faith misstatement of fact privilege has been recognized by a minority of states. Eaton, "American Law of Defamation," p. 1362.

[69]For an overview of fair comment in the nineteenth and early twentieth centuries, see, George Chase, "Criticism of Public Officers and Candidates For Office," American Law Review 23 (1889): 346; John E. Hallen, "Fair Comment" Texas Law Review 8 (1929):41.

[70]Thomas M. Cooley, Law Of Torts, (Chicago: Callaghan And Co., 1879), p. 210.

[71]John Townshend, A Treatise on the Wrongs Called Slander and Libel, Sec. 209, (New York: Baker Voorhis & Co., 1868), p. 249.

[72]Curry v Walter,126 Eng. Rep. 1046 (C.P. 1796).

[73]Ibid., p. 1046.

[74]King v Wright, 101 Eng. Rep. 1396 (1799).

[75]Ibid., p. 1399.

[76]Sowle, "Defamation and the First Amendment," p. 478.

[77]Coleman v MacLennan, 98 P. 281 (Kan., 1908).

[78]Ibid., pp. 285, 292. The Kansas Court conditioned the privilege by establishing an actual malice standard. The privilege failed if the plaintiff could prove that the defendent acted with "actual evil-mindedness," which could be shown by producing evidence that the defendant was "reckless in making the charge," or "pernicious."

[79]Commonwealth v Clap, 4 Mass. 163 (1808).

[80]Ibid., p. 163.

[81]Ibid., p. 165.

[82]Ibid., p. 169.

[83]Justice Thomas Cooley's concurring opinion in Foster v Scripps, 39 Mich. 376,383 (1878) illustrates the public interest rationale of the nineteenth century:

> The reason for permitting a privilege of discussion in the case of a city physician [charged with malpractice] must be this; that by operating on public opinion through the means of public discussion, the board having power might indirectly be influenced, and a removal brought about in the case of an unfit officer. But if the discussion proves to be wholly unwarranted by the facts, there is not only grievous private injury, but also serious public injury...

Therefore, Cooley reasoned, no privilege existed to protect false statements of fact concerning a public official not running for reelection.

[84]See, in general, Anon. "Critical Notice: A Treatise on the Law of Slander and Libel." American Law Magazine 2 (1844): 255, George Chase. "Criticism of Public Officers and Candidates For Office."

American Law Review 23 (1889): 346, Van Vechten Veeder. "History and Theory of Law of Defamation." Columbia Law Review 3 (1903): 546.

[85]Vincent Blasi. "The Checking Value in First Amendment Theory." American Bar Foundation Research Journal 3 (1977): 523.

[86]Ibid., p. 528.

[87]Bernard Bailyn, The Ideological Origins of the American Revolution, (Cambridge: Harvard University Press, 1967)pp. 55-93; also, Bailyn, The Origins of American Politics (New York: Alfred A. Knopf, 1968), pp. 95-109.

[88]quoted in Respublica v Oswald, 1 Dallas 319, 325 (Pa., 1788).

[89]Respublica v Oswald, 1 Dallas 319 (Pa., 1788).

[90]Ibid., p. 325.

[91]Ibid.

[92]Thomas Starkie. A Treatise on the Law of Slander, Libel and Scandalum Magnatum (New York: Collins & Harmany, 1832); also see Clifton O. Lawhorne. Defamation and Public Officials. (Carbondale: Southern Illinois Press, 1971) pp. 39-111.

[93]The political press was the dominant newspaper press in the first half of the century. Political parties funded partisan newspapers which served as organs for the political parties. In a time when even relatively small towns had opposing partisan papers, political figures responded in the party papers to charges made by the opposition rather than by filing libel suits. Gerald J. Baldasty. "The Press and Politics in the Age of Jackson. Journalism Monographs 88 (August 1984); Rosenberg, Protecting the Best Men, pp. 128-150.

[94]"A Faithful Report of the trial of the cause of Philip I. Archularius and William Coleman..." (New York: Sampson, 1807).

[95]Ibid., p. 30.

[96]Ibid. The jury returned a verdict of not guilty, but the law and the trial record appear to be in conflict with the jury's decision.

[97]Root v King, 7 Cow. 613, 628 (N.Y., 1827).

[98]Commonwealth v Lee, p. 29.

[99]Root v King, 7 Cow. 613, 628 (N.Y., 1827).

[100]Ibid., see also, Skinner ads Power, 1 Wend. 451 (N.Y. 1828), Arnold v Clifford, 1 Fed Cas 1177 (D. R.I., 1835), Usher v Severance, 20 Me. 9 (1841), Sheckell v Jackson, 64 Mass. 25 (1852), Hunt v Bennett, 19 N.Y. 173 (1859), Matthew v Beach, 7 N.Y. Supreme Court 256 (1851), Tresca v Maddox, 11 La. Ann. 206 (1856), Sanford v Bennett, 24

N.Y. 20 (1861), Cincinatti Gazette Co. v Timberlake, 10 Ohio St. 548 (1860), Pittock v O'Neil, 63 Pa. St. 253 (1869), Byers v Martin, 2 Colo. 605 (1875), Foster v Scripps, 39 Mich. 376 (1878), Wilson v Fitch, 41 Cal. 363 (1871), Hewitt v Pioneer Press, 23 Minn. 178 (1876), Negley v Farrow, 45 A. 715 (Md., 1882), Bourreseau v The Detroit Evening Journal Co., 63 Mich. 425 (1886), Bigney v Van Benthusen, 36 La. Ann. 38 (1884), Cowley v Pulsifer, 137 Mass. 392 (1884), Mallory v Pioneer Press, 26 N.W. 904 (Minn., 1884), Metcalf v Times Publishing Co., 40 A. 864 (R.I., 1898), Arnold v Saying Co., 76 Mo. App. 159 (1898).

[101]King v. Root, 4 Wend. 113, 133 (N.Y., 1829).

[102]Ibid.

[103]Hotchkiss v Oliphant, 2 Hill 510, 513 (N.Y. 1842)

[104]Arnold v Clifford, 1 Fed. Cas. 1177 (D. R.I., 1835).

[105]Ibid.

[106]Joseph Story. A Familiar Exposition of the Constitution of the United States (New York: Harper and Bros., 1852).

[107]Ibid., p. 263.

[108]Ibid., p. 262.

[109]"Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity." Blackstone Commentaries Thomas Cooley, ed., 4th edt. vol. 4 (Chicago: Callghan & Co., 1899) p. 152.

[110]Commonwealth v Wright, 10 Monthly Law Reporter 218 (July 1847).

[111]Ibid., p. 223.

[112]Michael Schudson. Discovering the News (New York: Basic Books, 1978); Dan Schiller. Objectivity And The News. (Philadelphia: University of Pennsylvania Press, 1981) pp. 12-96.

[113]Sheckell v Jackson, 64 Mass 25 (1852).

[114]Hotchkiss v Oliphant, 2 Hill 510, 513 (N.Y. 1842)

[115]Fry v Bennett, 16 N.Y. Supr. Ct. 200, 223 (1858)

[116]Sheckell v Jackson, 64 Mass 25 (1852).

[117]Ibid., p. 25.

[118]Ibid., p. 26

[119]Ibid.

[120]Ibid., p. 27.

[121]Tresca v Maddox, 11 La. Ann. 206 (1856).

[122]Moore v Stevenson, 27 Conn. 14, 29 (1858).

[123]Ibid., p. 14.

[124]Ibid., p. 29.

[125]Tresca v Maddox, 11 La. Ann. 206 (1856).

[126]Ibid.

[127]Ibid.

[128]Van Derverer v Sutphin, 5 Ohio 293 (1855)

[129]Ibid. However, in Massachusetts, the Supreme Judicial Court did recognize a more liberal fair report privilege. It expanded the privilege to include "proceedings before all public bodies, and for the publication of those proceedings for the necessary information of the people." The court said a more liberal privilege than existed in England was required in the United States because of the large number of public meetings of all kinds taking place. Barrow v Bell, 73 Mass. 301, 313 (1856).

The privilege to report on the public actions of public officials and about public meetings also was litigated in the 1850s. For example, in Hunt v Bennett, 19 N.Y. 173 (1859) a New York Court of Appeals held that the privilege did not extend to a article accusing a candidate for an appointed office of police justice of having "beaten, with a whalebone cane, a drunken woman, whom he had arrested," because the office was an appointed one rather than an elected office.

[130]"The Great Libel Case: Report of the Criminal Prosecution of the News and Courier for Libeling Sheriff and Ex-Congressman C.C. Bowen: The State v F.W. Dawson." (Charlestown, S.C.: New and Courier Co., 1875).

[131]Ibid., p. 76.

[132]In a survey taken as part of this research of appellate court reports and available trial court reports, the author found fewer than 15 reported cases per decade for the period from 1800 to 1869. In the 1870s and 1880s, over 30 reported cases in each decade were found, but in the 1890s in number dropped below 20 cases. Also see, Rosenberg., Protecting the Best Men, pp. 197-204.

[133]The First Decennium of the National Editorial Association vol.1 (Chicago: NEA, 1896). "ANPA Annual Minutes, 1890-1897."

[134]Alfred M. Lee. The Daily Newspaper in America, (New York: The Macmillian Co., 1937), p. 717.

[135]Smith v Tribune, 22 Fed. Cas. 689 (N.D.Ill., 1867)

[136]Ibid., p. 691.

[137]Detroit Daily Post v McArthur, 16 Mich. 447 (1868).

[138]Ibid., p. 451.

[139]Ibid., p. 454.

[140]Ibid., p. 455. Privilege did not provide complete protection. The defendant could be held liable for estimated, special and general damages.

[141]Byers v. Martin, 2 Col. 605 (1875).

[142]McBee v Fulton, 47 Md. 403 (1877).

[143]Hewitt v Pioneer Press, 23 Minn. 178 (1876).

[144]Storey v Wallace, 60 Ill. 51 (1871)

[145]Bailey v Kalamazoo Publishing, 40 Mich. 251, 253 (1879).

[146]Heilmann v Shanklin, 60 Ind. 424 (1878).

[147]Story v Wallace, 60 Ill. 51, 57 (1871).

[148]Ibid., p. 54.

[149]Marks v Baker, 9 N.W. 678 (Minn., 1881).

[150]Ibid.

[151]Miner v Post Trubune, 49 Mich. 358, 364 (1882).

[152]Press Co. v Stewart, 14 A. 51 (Pa., 1888).

[153]Ibid., p. 53.

[154]Bourreseau v The Detroit Evening Journal Co., 63 Mich. 425 (1886).

[155]Ibid., pp. 427-428.

[156]Ibid., p. 429.

[157]Ibid., p. 432.

[158]Atkinson v Detroit Press, 46 Mich. 341, 383 (1881).

[159]Scripps v Reilly, 38 Mich. 10, 27 (1878)

[160]Ibid., p. 22.

[161]Ibid., p. 27.

[162]Ibid., p. 28.

[163]Foster v Scripps, 39 Mich. 376 (1878).

[164]Ibid., p. 383.

[165]Scripps v Foster, 41 Mich. 742 (1879). The case first went to the State Supreme Court on an appeal of a directed verdict for the defendant, James E. Scripps the publisher of the Detroit Evening News. The Supreme Court overturned the verdict and remanded the case for trial. After a jury verdict for the plaintiff, Scripps appealed on several points, including a claim of privilege.

[166]Ibid., p. 745.

[167]Bailey v Kalamazoo Publishing Co., 40 Mich. 251, 257 (1879).

[168]Bathrick v Detroit Post & Tribune Co., 50 Mich. 629, 639 (1883).

[169]McAllister v Detroit Free Press, 76 Mich. 338 (1889).

[170]Ibid.

[171]Ibid., p. 348-350.

[172]Ibid., p. 355.

[173]Ibid.

[174]Ibid., p. 356

[175]Wilson v Fitch, 41 Cal. 363, 364 (1871).

[176]Ibid., p. 383.

[177]Struthers & Sons v The Evening Bulletin, 3 W.N.C. 215, (Pa., 1877)

[178]Ibid., pp. 217, 218.

[179]Ibid., p. 218

[180]Edwards v Kansas City Times, 32 Fed. 813, 818 (W.D.Mo., 1887).

[181]Neeb v Hope, 17 W.N.C. 93 (Pa., 1885).

[182]Ibid.

[183]Negley v Farrow, 60 Md. 158 (1882).

[184]Ibid., p. 160.

[185]Ibid., p. 177.

[186]John Townshend, A Treatise on the Wrongs Called Slander and Libel, 4th ed., (New York: Baker Voorhis & Co., 1890).

[187]Ibid., p. 445-46.

[188]Ibid.

[189]Barnes v Campbell, 59 N.H. 128, 129 (1879).

[190]Regensperger v Kiefer, 7 A. 724, 725 (Pa., 1887).

[191]Riley v Lee, 11 SW 713, 715 (Ky., 1889).

[192]Edwards v San Jose Printing Co., 34 P. 128 (Cal., 1893)

[193]Ibid., p. 129.

[194]Ibid., p. 130.

[195]Arnold v Saying Co., 76 Mo. App. 159, 165 (1898).

[196]Ex Parte Barry, 25 P. 256 (1890).

[197]Ibid., p. 608.

[198]Ibid.

[199]Fitzpatrick v Daily State Publishing, 20 So. 173 (1896).

[200]Ibid., p. 174.

[201]Ibid., p. 176.

[202]Ibid., p. 178.

[203]Ibid., p. 181.

[204]Upton v Hume, 33 P. 810 (1893).

[205]Ibid.

[206]Ibid., p. 811.

[207]Metcalf v Times Publishing Co., 40 A 864, 865 (R.I.,1898)

[208]New York Times v Sullivan, 376 U.S. 254, 272 (1964), quoting NAACP v Button, 371 U.S. 415 (1963).